DISSENTING STATEMENT OF COMMITTEE MEMBER CHRISTOPHER SKINNER, JOINED BY COMMITTEE MEMBERS RANDY CHAPMAN AND JUDGE JAY BLITZMAN

The Supreme Judicial Court recently decided the unusual case of *Commonwealth v. Ly*, 450 Mass. 16, 21 (2007), in which, having been released on a stay of execution of sentence issued by a single justice of the Appeals Court, Mr. Ly remained at liberty for sixteen years after he lost his appeal. The court noted, "If there is fault to be attributed, it lies at the Commonwealth's doorstep, at least for its failure to bring to the court's attention, in 1991, by way of motion or otherwise, the immediate necessity to revoke the stay of execution of the defendant's sentences, and, perhaps, its failures, in 1999 and 2001, to examine the defendant's criminal history carefully (which could have alerted someone to the oversight). The Commonwealth offers no explanation for these failures, other than to concede that there was an 'inadvertent error.'" *Id.* at 21 (footnote omitted).

While it is true that Rule 31 does not set out step by step the procedures to be followed where a defendant on a stay loses his appeal, one wonders whether this isolated and extreme case warrants the total overhaul of the rule proposed by this committee.

As with the adage that "to a hammer, every problem looks like a nail," there is always the danger that any problem given to a rules committee will result in a new rule, or the major renovation of an old one.

Discussion on this issue in the committee correctly assessed that, given the length of time that may be involved between the filing of a notice of appeal and the issuance of the final rescript, the trial prosecutor may have moved on from the office. Similarly, trial counsel for the defense is normally not appellate counsel and appellate counsel certainly will have less day-to-day contact with the appellant/defendant than trial counsel did.

Rather than merely clarifying the procedure, however, the proposal undertakes a major overhaul of Rule 31. It creates new obligations and terminology (e.g., the "release of the rescript"). All of this seems unnecessary in addressing the problem in the *Ly* case. Surely there are a multitude of ways for the parties to keep track of whether a defendant's sentence is the subject of a stay, none of which would require a rewriting of Rule 31.

The proposed rule opts for the rather extreme departure from current practice by establishing the automatic termination of such stays, leaving the at-liberty defendants in a puzzling legal status of free, but not entirely legally so. More troubling is the timing of the automatic termination. The proposed rule would automatically terminate the stay upon the "release" of the rescript, as opposed to its issuance, "unless extended by the appellate court". This addresses a problem not even present in *Ly* and creates new problems.

Some of the consequences of such a change would include, it would seem, litigation before the

Appeals Court, either the panel or the single justice, to extend the stay until the unsuccessful defendant has either decided not to file for, or has been denied, further appellate review.

In cases where further appellate review is granted, under the proposed revisions, the defendant would likely have been taken into custody to begin serving the sentence, and would likely be seeking a hearing before the Single Justice for Suffolk County to have the stay re-imposed.

The language "unless extended by the appellate court," suggests that even where the stay was granted in the first instance by the trial court, the trial court would be relieved of the authority to address the stay pending further appellate review.

Both defense counsel and the counsel for the Commonwealth are notified of the "release" of the decision. There is nothing in the existing rule that would have prohibited the prosecution in the *Ly* case from moving either in the Appeals Court or the Trial Court at any point after that for a revocation of the stay. The problem was not the rule; it was the lack of attention being paid to the case, "an inadvertent error."

One argument advanced in favor of the proposal is that the lynchpin for a stay is what is characterized as "likelihood of success on appeal" and that losing in the Appeals Court vitiates the reason for the stay. *Commonwealth v. Hodge (No. 1)*, 380 Mass. 851 (1980), however, suggests that the test is not so much likelihood of success on appeal as there being "an issue worthy of presentation to an appellate court." "In order for a stay of execution to be granted, the appeal must present 'an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.'" *Commonwealth v. Hodge (No.1)*, 380 Mass. 851, 855 (1980) (citing *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979), quoting *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979).

Certainly there are cases where the defendant loses at the Appeals Court where the issue is worthy of presentation to an appellate court and where the Supreme Judicial Court will accept further appellate review. Some examples include where the Appeals Court's decision is by a 2-1 vote, or where the appellant has a meritorious argument that the current state of the law should be changed, but the Appeals Court is constrained to leave such changes to the Supreme Judicial Court. The proposed rule would do as much harm in these cases as any good it might hope to do in others.